United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

NO. 76-4275

UNITED STATES COURT of APPEALS

FOR THE SECOND CIRCUIT

COMMUNICATION WORKERS OF AMERICA, LOCAL 1122,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

NEW YORK TELEPHONE COMPANY,

Intervenor.

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence in the whole record supports the Board's finding that Local 1122 violated Section 8(b)(3) of the Act by attempting to unilaterally modify the collective bargaining agreement insofar as it protected the Company's right to appoint temporary supervisors.

2. Whether the Board properly concluded that the Union's disciplinary measures, aimed at deterring employees from accepting temporary supervision assignments, violated Section 8(b)(1)(B) and 8(b)(1)(A) of the Act.

COUNTERSTATEMENT OF THE CASE

This case is before the Court upon the petition of Communications Workers of America, Local 1122 ("Local 1122") for review of an order of the National Labor Relations Board, and upon the Board's cross-application for enforcement. On January 10, 1977, the Court granted the New York Telephone Company ("the Company") leave to intervene. The Board's decision and order (A. 3-12) [1/] issued on September 23, 1976, and is reported at 226 NLRB No. 7. This Court has jurisdiction of the proceedings under Section 10(e) and (f) of the National Labor Relations Act, as amended (61 Stat. 519, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. Sec. 151, et seq.), the unfair labor practices having occurred in Buffalo, New York, within this judicial circuit, where the Company is engaged in the business of providing and installing local and long distance telephone communications and related services.

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that Local 1122 violated Sections 8(b)(3), 8(b)(1)(B) and 8(b)(1)(A) of the Act by unilaterally attempting to cancel

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1/ "A." references are to the joint appendix and "E" references are to the Exhibit volume. References preceding a semicolon are to the Board's findings of fact; those following are to the supporting evidence.

contractual provisions permitting unit employees to serve as temporary supervisors, and by enforcing this new policy through intraunion charges filed against a unit employee. The bases for the Board's findings are summarized below.

A. The Company gains contractual recognition of its right to assign unit employees to voluntary service as temporary supervisors; thereafter the National Union fails to gain the Company's agreement to a limitation on this right

For several years prior to 1961, the Company's practice was to promote rank-and-file employees from various crafts to temporary supervisory positions (A. 5; 113, 119-120). The Company utilized temporary supervisors when permanent supervisors were absent because of vacations, illness or special assignments; during temporary expansion of the work force, as when new equipment was being installed; and to provide the Company with "an opportunity to see craft employees . . . in a managerial role for a short period of time" (A. 18; 50-54, 106-107).

In 1961 the Communication Workers of America - that is, the National Union as opposed to Local 1122 - was certified as the exclusive bargaining representative in a single state-wide unit covering about

30,000 employees, who were organized into 22 locals (A. 4, 15-16) [2/] Subsequently, several collective bargaining agreements were entered into. Each contract was negotiated on a state-wide basis by the Company and the National Union rather than the separate locals (A. 4; 40-41).

Since about 1962, the parties' contracts have included the following clause about the Company's right to assign unit members to jobs outside the bargaining unit on a temporary basis (A. 5; E.6, emphasis added):

> "The Company may transfer or assign temporarily or permanently, any employee from an occupational classification to another, or from one assignment to another within the same occupational classification, or from an occupational classification to a position outside the bargainign unit either as a step in force adjustment or for other purposes."

2/ The unit consisted of (A 15; E3):

> Included: All plant, network operations, customer services, technical services, engineering and facilities employees of New York Telephone Company whose occupational classifications are listed in the craft, building and supplies, clerical and miscellaneous appearing in Article 31; all employees in the Empire City Subway Company (Limited;) it being understood that the certified unit shall include only those employees employed in occupational classifications which were included in the certified unit under the previous collective-bargaining agreement.
>
> Excluded: All guards, watchmen, professional employees, supervisors as defined in the National Labor Relations Act, as amended, and employees regularly performing confidential labor relations duties.

The contracts also included the following clauses bearing upon certain rights of unit employees who have been temporarily reassigned (A. 5; E 9, 5, emphasis added):

> "An employee temporarily promoted to a management job shall be charged with the average overtime of his unit during the entire period of his absence from his unit on the acting assignment."
>
> "An employee's written authorization for [payroll dues] deduction shall be cancelled automatically by the Company when the employee is transferred except on an acting basis, to a position where he is no longer covered by the terms of this Agreement.

In 1968, during negotiations pursuant to a wage-reopener clause contained in the 1967-1971 contract, the National Union attempted to reduce the Company's ability to appoint temporary supervisors, but the Company rejected the proposal (A. 5, 23; 142-144).[3/] During subsequent negotiations for the 1971 and 1974 contracts, the National Union did not raise this issue again (A. 5; 142-144).[4/]

3/ The National Union had proposed that "Any employee promoted to management shall lose all seniority as to choice of vacations, promotions, selection of tours [and] transfers upon his return to the bargaining unit, for the length of the time he was promoted to management." (E. 20). The National Union's negotiators admitted they were trying to make these assignments less attractive to unit employees (A. 142-143).

4/ The contract in force during material times herein covered the period from July 18, 1974 to August 7, 1977 (A. 8). It was signed on behalf of the National Union by M. Don Sanchez, Area Director of District 1, which included New York State, and was "approved" by G.E. Watts, National President. Representatives of 6 of the 22 constituent locals, including Local 1122, merely "attested" to the execution (ibid).

Personnel records show that from 1962 until 1969, under the above contractual provisions, the Company's practice of assigning unit employees to temporary supervisory positions was "a general, long-standing, widespread and consistent" practice "throughout Upstate New York" (A. 19, n. 2). Thus, during the period 1962 to 1969, 313 of the approximately 1000 members of Local 1122 were promoted to temporary supervisory positions on 466 occasions (A. 81, 82, E. 21-23).

B. In 1969, Local 1122 announces a total ban on its members' accepting temporary supervisory jobs

In 1968, as just related, the National Union failed to achieve a contract limitation on the Company's right to assign employees to temporary supervisory positions. Nevertheless, in early 1969, Local 1122,together with two sister locals, adopted a flat prohibition against its members accepting such positions (A. 6, 23; 200-202, 211-214).[5/] James Hennessy, Division Plant Superintendent of the Western Area, asked Local 1122 to rescind its ban in return for the Company's promise to reduce utilization of acting supervisors and to refrain from assigning them to supervise their own work groups (A. 25; 211-214). On May 9, 1969, the

5/ The rule provided (E. 16):

> "Effective June 1, [1969] no Union member within the jurisdiction of this Local shall accept the position of acting supervision. If any Union member shall do so, appropriate action of any lawful procedure up to and including expulsion from the Local union shall be taken. Effective June 1, 1969 all union members within the jurisdiction of this Local, now serving in the capacity of acting supervision shall return to their craft positions or be subject to the same appropriate action."

membership voted to reject Hennessy's offer and to implement the ban (A. 6, 23; 200-202, 211-214). The Locals' action was publicized through its newspaper and through notices posted at all work locations (A. 23; 218-219, E. 16-17). The notices required "all members now serving in the capacity of acting supervision [to] notify the Company of their intention of returning to their craft status on or before June 7, 1969" (E. 16). The ban was never rescinded and is still in effect (A. 23; 218). 6/

For nearly three years (June 1969 to August 1972) the Company did not challenge the ban and did not appoint any temporary supervisors in the Buffalo area. 7/ In 1972, it resumed its former practice (A. 6; 104-109, E. 21-23). Initially, Local 1122 did not oppose the resumption. However, when employee Richard Macvie accepted a temporary supervisory position from June 8 to 14, and another from June 21 to July 2, 1975,the Local's chief steward charged Macvie with "violating the . . . Union rule prohibiting a member from accepting 'Acting Supervision' assignment" (A. 6, 26; E 18). On July 8, 1975, Macvie was advised by the Local's secretary that the executive board had reviewed the charge, found it "in proper order for

6/ Local 1122's apparent motive for instituting the ban was to force the Company to promote more unit employees to permanent -- instead of temporary -- supervisory positions. In the first six months following the ban the Company promoted 50 to 60 permanent supervisors as compared to the usual number of 15 to 20 (A. 24; 221).

7/ From July 14, 1971 to February 18, 1972, no assignments were made anywhere in the state because the entire bargaining unit was on strike (A. 6, n. 4; 140).

trial" and would notify Macvie of the trial date "as soon as arrangements are formalized" (A. 26; E19). At the time of the unfair labor practice hearing in this case (January 19-20, 1976), the charges were still pending against Macvie (A. 42-43).

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board, in disagreement with the Administrative Law Judge, concluded that Local 1122's attempts to discourage the appointment of temporary supervisors, by announcing and enforcing a prohibition against its members' accepting such appointments, amounted to an effort to unilaterally alter the collective bargaining agreement in violation of Section 8(d) and 8(b)(3) of the Act. The Board also concluded that the same conduct restrained and coerced the Company in the selection of its supervisors in violation of Section 8(b)(1)(B), and restrained and coerced the Company's employees in violation of Section 8(b)(1)(A).

Local 1122 was ordered to cease and desist from instituting, maintaining or enforcing any ban or embargo against acceptance by unit employees of temporary supervisory positions without affording the Company a timely opportunity to bargain within the meaning of Section 8(d) of the Act; from restraining or coercing employees in the exercise of their Section 7 rights by penalizing, threatening to penalize or bringing charges against employees for accepting supervisory positions in violation of the ban; or from in any similar manner restraining or coercing the Company in the selection of representatives for the purposes of collective bargaining or adjustment of grievances. Affirmatively, Local 1122 was ordered to cancel, withdraw, and rescind the ban and notify the Company, in writing,

that such action has been taken; expunge from its records all action taken against Richard Macvie and any other unit employees because they violated the ban; notify them by letter that such action has been taken; cancel and reimburse any penalty assessed; make whole for lost wages Macvie and any other unit employees who were forced to relinquish temporary supervisory positions; and post customary notices (A. 9-12).

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT LOCAL 1122 VIOLATED SECTION 8(b)(3) BY ATTEMPTING TO UNILATERALLY MODIFY THE COLLECTIVE BARGAINING AGREEMENT INSOFAR AS IT PROTECTED THE COMPANY'S RIGHT TO APPOINT TEMPORARY SUPERVISORS

Discussing the scope of Section 8(b)(3) in a nearly identical case, this Court has said (N.L.R.B. v. Communication Workers of America, AFL-CIO, Local 1170, 474 F.2d 778, 780 (1972)):

> Under §8(b)(3), it is an unfair labor practice for a representative union "to refuse to bargain collectively with an employer." The collective bargaining obligation, as defined in §8(d), includes a duty not to terminate or modify an existing contract unless the party seeking such termination or modification gives to the other party specified notification in advance of the expiration date or offers to reopen negotiations.

It follows that where a union unilaterally adopts and enforces a policy in derogation of a right guaranteed the employees by the parties' contract, it violates Section 8(b)(3). N.L.R.B. v. Communication Workers, supra; New York District Council No. 9, International Brotherhood of Painters and Allied Trades, AFL-CIO v. N.L.R.B., 453 F.2d 783 (C.A. 2, 1971), cert. denied, 408 U.S. 930 N.L.R.B. v. Truckdrivers, Chauffeurs, and Helpers, Local Union No. 100, 526 F.2d 731 (C.A. 6, 1975); Associated Home Builders of Greater East Bay, Inc. v. N.L.R.B. 352 F.2d 745, 752-753 (C.A. 9, 1965).

Initially, there is ample support for the Board's finding that "the contract clearly grants the Company the right to assign temporary supervisory positions to unit employees" (A. 5). As shown, supra,

pp. 4-6, for several years prior to 1961, when the National Union was certified as the bargaining agent, the Company's "longstanding, widespread and consistent" practice was to utilize bargaining unit employees as temporary supervisors. From about 1962, the parties' contracts have contained in unaltered form a clause recognizing the Company's right to "transfer or assign, temporarily or permanently, any employee . . . from an occupational classification to a position outside the bargaining unit. . . for [all] purposes." (emphasis added). The same right was recognized in contractual provisions pertaining to "Equalization Overtime Procedures" and "Payroll Deduction of Union Dues". Furthermore, the National Union implicitly conceded that the contract protected the Company's right to appoint temporary supervisors when, in 1968, it bargained for a new clause admittedly intended to make such appointments unattractive to its members.

The record is likewise clear that Local 1122's efforts to discourage its members from accepting such assignments amounted to a unilateral alteration of the contract terms which was forbidden by Section 8(d). From 1969, as described, Local 1122 maintained a prohibition against its member's accepting temporary supervisory jobs. It is true, of course, that even prior to 1969 the Company's employees were not obligated to accept the Company's offers of temporary supervisor positions. What the contract guaranteed the Company, however, was that these employees should be able to consider such offers in an atmosphere free from union constraint.

When Local 1122 prohibited its members from accepting such appointments, established penalties for infractions, and took disciplinary action against an employee who ignored this ban, its conduct was clearly "in derogation of a [settled practice which was also] incorporated in the collective bargaining agreement" and therefore "constituted a violation of Section 8(b)(3)." N.L.R.B. v. Communication Workers Local 1170, supra, 474 F.2d at 780, 782; and cases cited supra, p. 10.[8/]

Local 1122's main defense (Br. 15-23) is that the Company "waived" its statutory rights because, in the face of Local 1122's new policy, it chose to suspend its use of temporary supervisors for about three years. The Board properly rejected this contention. First, as the Board noted, the parties' agreements had all contained a clause which permitted "no waiver or modifications" as to any terms except in writing.[9/] Even without this clause, however, the Company's position was protected by the settled principle that the waiver of a right to

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8/ In Local 1170, the same practice of appointing temporary supervisors was at issue. On this subject while the parties' contracts were silent in this regard, this Court agreed with the Board's finding that the parties had reached an additional understanding, which "became part of the contemporaneous bargain which the parties made in executing their 1967 contract." 474 F. 2d at 781. The union's subsequent "unilateral adoption of an embargo on acceptance of temporary supervisory assignments," since it was "in derogation of [this] agreed upon practice," violated Section 8(b)(3). Id. at 780.

9/ The provision reads (E. 7, emphasis supplied):

> "[t]his agreement constitutes the entire agreement between the parties, and no waiver or modification shall be effective unless signed by the parties hereto, and no such writing, applicable to any particular instance or instances shall be construed as general waiver or modification, but shall be strictly limited to the extent and occasions specified herein."

bargain about a statutory subject must be established by "clear and unmistakable" proof that the party has intentionally yielded its rights. Timken Roller Bearing Co. v. N.L.R.B. 325 F.2d 746, 751 (C.A. 6, 1963), cert. denied, 376 U.S. 971, and cases cited. Accord: Henry I. Siegel Co., Inc. v. N.L.R.B., 340 F. 2d 309, 310 (C.A. 2, 1965). Here, there was nothing more than Local 1122's abrupt imposition of its rule, followed by three years during which the Company refrained from approaching Local 1122 directly on the matter, so far as the record shows, or from challenging the union's actions by legal means. Obviously, there was no benefit to the Company from its willingness to suspend the practice during that time. More important, Local 1122 cannot show that it changed its position in reliance upon the Company's forbearance.[11/] In short, there is no reason in law or in equity for letting Local 1122 profit from its unlawful repudiation

11/ Compare 3A Corbin, Contracts, pp. 481-482, explaining that the "waiver" of a contractual right may be rescinded, and the right reinstated, unless the other party "shall have changed his position in reliance upon [the waiver];" that "[a] contractual modification, by substituted agreement, requires the consent of both parties;" and that "[t]o create an estoppel, also, action by both parties is required . . . ."

of the bargaining agreement merely because of the Company's delay in asserting its statutory and contractual rights.[12/]

II. THE BOARD PROPERLY CONCLUDED THAT THE UNION'S DISCIPLINARY MEASURES, AIMED AT DETERRING EMPLOYEES FROM ACCEPTING TEMPORARY SUPERVISOR ASSIGNMENTS, VIOLATED SECTION 8(b)(1)(B) AND 8(b)(1)(A) OF THE ACT

A. The Section 8(b)(1)(B) violation

Section 8(b)(1)(B) makes it an unfair labor practice for a labor organization "to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." A labor organization violates the basic thrust of this provision when it attempts to dictate the employer's choice of agents for grievance handling or contract bargaining. See, e.g., International Ladies' Garment Workers' Union, AFL-CIO, Northeast Department (Slate Belt Apparel Contractors Assoc.), 122 NLRB 1390 (1959), enforcement denied on narrow ground that employer's representative had earlier held "highly confidential position" with the Union, 274 F. 2d 326, 329 (C.A. 3, 1960); Associated General Contractors of America, Evansville Chapter, Inc. v. N.L.R.B., 465 F.2d 327 (C.A. 7, 1972), cert. denied, 409 U.S. 1108; Southern California Pipe Trades District Council No. 16 (Paddock Pools of

12/ Justesen's Food Stores, Inc. 160 NLRB 687 (1966), relied on by Local 1122 (Br. 15), is inapposite. There, the Administrative Law Judge approved the employer's unilateral installation of a labor saving machine because he construed the parties' contract to give the employer this right. While the Judge referred to the union's failure to object to this action, that circumstance was cited only as one which "lends weight" to the Board's reading of the contract (at p. 693). Affirming the Judge's conclusion, the Board pointed to the Union's failure to protest the change for almost six months -- at which point it filed an unfair labor practice charge -- but also noted the Union's failure to argue to the Board that the change "exceeded the authority conferred by the . . . contract" (at 688 n. 2).

California, Inc.), 120 NLRB 249 (1958); Los Angeles Cloak Joint Board, a/w International Ladies' Garment Workers' Union, AFL-CIO (Helen Rose Company, Inc.), 127 NLRB 1543 (1960). See also Florida Power & Light Co. v. International Brotherhood of Electrical Workers, Local 641, 417 U.S. 790, 795 (1974).[13/]

Here, the uncontradicted documentary and testimonal evidence establishes that first line supervisors were responsible for planning work loads, assigning work to individual craftsmen, maintaining employees' productivity and work quality, insuring compliance with attendance and tardiness standards, training employees, determining overtime requirements and assigning overtime (A. 9, 20; 56, 57, 127, 128, E. 31-33). First line supervisors also had authority on their own to discipline employees or recommend such action to higher level supervisors (A. 18, 25; 56-57, E31-33). Moreover, both temporary and permanent supervisors possessed meaningful authority to -- and in fact did -- accept, process, and participate in adjusting formal grievances (A. 8-9, 18, 20; 57, 127-128, E31-33) and informal on-the-job complaints (A. 9; 111-112, 129). Thus, documentary evidence shows that temporary supervisors had participated in adjusting grievances arising out of a wide variety of disputes including scheduling work tours (E. 23) and vacations (E. 95-98); determining payment

13/ Florida Power, contrary to Local 1122 (Br. 10-14), does not stand for the proposition that a union is insulated from Section 8(b)(1)(B) when it disciplines its members if it raises a colorable "distraction of loyalty" defense. That case contains a narrrow holding to the effect that Section 8(b)(1)(B) does not prohibit a union from disciplining supervisor members if they have crossed the union's picket line to perform struck work.

for "callouts" (E. 62), doctor visits (E. 79-81) and lodging allowance (E. 85-86); use of personal automobile for business purposes (E. 63); performance of unit work by supervisors (E. 64, 67-68); assignment of work (E. 85-86, 100-102) and overtime (E. 73-76); harassment of employees by supervisors (E. 69-70); suspension for misusing sick leave (E. 82-84); rotation of tours (E. 87-90) and "board and lodging" assignments (E. 87-88); unsafe working conditions (E. 91-94); and upgrading (E. 103-106).

The Union does not appear to dispute that the disciplinary measures it used to enforce its unilateral policy against temporary supervisors were calculated to restrain union members from accepting the Company's offers of temporary supervisor assignments. Since, as shown, these temporary supervisor jobs carried the authority to represent the Company "for the purposes of the adjustment of grievances," the Union's conduct improperly restrained the Company within the intent of Section 8(b)(1)(B).

There is no merit in Local 1122's contention (Br. 2-6) that, in contrast with other New York State locals, the temporary supervisors appointed from its membership (and from that of the other two Buffalo-area locals) had no authority to deal with grievances. As support, it points to the absence of documentary evidence of meaningful grievance handling by any Company supervisor in the Buffalo area, whereas the record contains such evidence with respect to locals elsewhere in the State. This argument ignores the uncontradicted testimony of James Hennessy, Division Plant Superintendent for the Western Area, that temporary

supervisors have the same authority throughout the state. (A. 18, 25, 57, 124, 137, 157, 270-271). Furthermore, the Buffalo area locals have no unique status in the record: only 6 of the 22 New York State locals are represented in the 24 incidents of grievance handling documented in the record. Thus, the Board could reasonably infer that absence of opportunity to handle grievances, not want of authority, was the explanation for the state of the record in this regard.

B. The Section 8(b)(1)(A) violation

Section 8(b)(1)(A) makes it an unfair labor practice for a labor organization to "restrain or coerce . . . employees in the exercise of their rights guaranteed by Section 7." This section "leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule," Scofield v. N.L.R.B. 394 U.S. 423, 430 (1969). On the other hand, "if the union rule invades or frustrates an overriding policy of the labor laws, the rules may not be enforced even by fine or expulsion without violating Section 8(b)(1)." Id. at 429. The inquiry, then, "must . . . focus on the legitimacy of the union interest vindicated by the rule and the extent to which any policy of the Act may be violated by the rule," Id. at 431. 14/

In N.L.R.B. v. Communications Workers of America, AFL-CIO, Local 1170, supra, this Court held that a sister local's enforcement of an identical rule barring members' acceptance of temporary supervisory assignments violated Section 8(b)(1)(A) because the union's disciplinary action "did not stem from violations of a lawful union rule dealing with

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14/ In Scofield, the Supreme Court held that the union did not violate Section 8(b)(1)(A) by imposing a reasonable fine on a member who exceeded a contractually recognized production quota. Here, in contrast, Local 1122's disciplinary action was in aid of a union policy which contravened the express provisions of the parties' contract.

purely internal union matters but sought to enforce conduct we have held violated §8(d) and §8(b)(3)." 474 F.2d at 782. Here, as shown, the disciplinary proceedings against Macvie implemented a unilaterally adopted policy which violated Section 8(b)(1)(B) as well as Section 8(b)(3). A fortiori, the Board was entitled to conclude that this conduct also violated Section 8(b)(1)(A). See also Warehouse Union Local No. 6, International Longshoremen's and Warehousemen's Union (Associated Food Stores, Inc.), 210 NLRB 666 (1974); Communication Workers of America, AFL-CIO, Local 1127 (New York Telephone Co.), 208 NLRB 258, 260-262 (1974); Local 12419 International Union of District 50, United Mine Workers of America (National Grinding Wheel Company, Inc.), 176 NLRB 628 (1969).[15/]

Local 1122 offers the novel argument (Br. 24-25) that Section 8(b)(1)(A) does not protect employees like Macvie because the proposed discipline relates to his conduct when he was acting as a supervisor. The short answer is that none of the objectives served by excluding supervisors from the protection of the Act warrants this treatment of an employee who accepts a seven day assignment. See e.g., N.L.R.B. v. Stewart Oil Co., 207 F. 2d 8, 10 (C.A. 5, 1953) ("Such occasional performance of supervisory duties does not make an employee a

15/ Contrary to the Union (Br. 25-27), National Maritime Union of America, 78 NLRB, 971, 982-987 (1948), enf'd 175 F. 2d 686 (C.A. 2, 1949); cert. denied 338 U.S. 954, does not teach that a Section 8(b)(1)(A) violation of the type here may not be predicated upon conduct violative of Section 8(b)(3) and 8(d). In that case, the union violated its statutory bargaining obligation by insisting to impasse on a nonmandatory subject. The Board concluded that a refusal to bargain "bottomed solely on the union's insistence upon a demand for [a nonmandatory] provision" did not restrain employees within the intent of Section 8(b)(1)(A). Id. at 985. Here, of course Local 1122 violated obligations arising from Section 8(b)(3) and 8(d) in a different and more serious way.

supervisor within the meaning of the Act"). In any event, the law is settled that unions as well as employers may unlawfully restrain employees in the exercise of Section 7 rights by actions directed at actual or prospective supervisors. See, e.g., International Union of Operating Engineers, Local 18 (C. F. Braun Co.), 205 NLRB 901 (1973) enf'd per curiam, 500 F.2d 48 (C.A. 6, 1974); Oil City Brass Works v. N.L.R.B., 357 F.2d 466, 470-472 (C.A. 5, 1966); N.L.R.B. v. King Radio Corp. 398 F. 2d 14, 21-23 (C.A. 10, 1968). See also Pederson v. N.L.R.B. 234 F.2d 417, 420 (C.A. 2, 1956). Clearly, the charges filed against Macvie would tend to coerce other unit employees into compliance with the Union's unlawful policy

There is no more substance in Local 1122's argument that its conduct was permissible because it had no effect on Macvie's or its other members' job rights. In a real sense, the unilateral ban interfered with its members' work opportunities. More important, even if union discipline affects only intraunion rights, it will nevertheless amount to unlawful restraint if it subverts a fundamental policy of the Act. N.L.R.B. v. Marine & Shipbuilding Workers Local 22, 391 U.S. 418 (1968); N.L.R.B. v. Cannery Workers Union, 396 F.2d 955 (C.A. 9, 1968), cert. denied, 393 U.S. 1025; Water Front Guard Association, Local 1852 (Amstar Corp), 209 NLRB 513 (1974), enf'd, 508 F.2d 839 (C.A. 4, 1974); International Molders and Allied Workers Union, Local 125, AFL-CIO (Blackhauk Tanning Co., Inc.), 178 NLRB 208 (1969) Local 4186, United Steel Workers of America, AFL-CIO (McGraw-Edison Co.) 181 NLRB 992 (1970). Here, as

shown, the Local's conduct was hostile to the basic policies embedded in Sections 8(b)(3), 8(d) and 8(b)(1)(B).

Finally, it is no defense that Local 1122's "primary objective," allegedly, was not to "impair a statutory labor policy" but to maintain its members' loyalty to the Local, to avoid friction which might arise when the temporary supervisors returned to unit work, and to increase its members' opportunities for promotion to permanent supervisor (Br. 28-36). As legitimate as these objectives may be, Local 1122 was not authorized to ride roughshod over the Company's and its own members' rights in order to advance them. Local 1122's proper course was to have the National Union, its bargaining agent, attempt to negotiate such limitations on the Company's use of temporary supervisors as the Local deemed necessary. Indeed, as the Counterstatement shows (p. 6), the Company had demonstrated its willingness to reach an accommodation on the issue before the Local imposed its total embargo.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Board's order should be enforced in full.

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~~March~~ APRIL, 1977

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and	)	
NEW YORK TELEPHONE COMPANY, Intervenor.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's brief in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

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Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 8th day of April, 1977.